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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 155

LOUIS KIRSHBAUM,

Appellant,

vs.

THE CITY OF LOS ANGELES, *et al.*,

Appellees.

On Appeal From the Supreme Court of the State of California.

REPLY TO MOTION OF APPELLEES (CITY OF LOS ANGELES) TO DISMISS.

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REPLY TO MOTION OF APPELLEES (CITY OF LOS ANGELES) TO DISMISS.

I.

Reply to Appellees' Argument Point 1.

(The Determination by the California Supreme Court That a Writ of Prohibition Should Issue From That Court to Stay Any Further Proceedings in the Los Angeles Superior Court to Enjoin Declaring the Results of a Referendary Election on a City Ordinance Does Not Present Any Reviewable Question Before the United States Supreme Court.)

The argument made by appellees that appellant's first two questions are all matters of local procedure under the rule announced in *Gasquet v. Lapeyre*, 242 U. S. 367, and

John v. Paullin, 231 U. S. 583, has been fully answered by appellant in his reply to the motion to dismiss filed by the Los Angeles Dodgers.

There is no conflict between these cases and the cases relied upon by appellant.

The decision of a State Court will be reviewed where, in violation of constitutional limitations, the State Court *itself* has denied due process of law:

N. A. A. C. P. v. Alabama, 357 U. S. 449, 456;
Hovey v. Elliot, 167 U. S. 409, 417, 419;
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Scott v. Neal, 154 U. S. 34, 36.

II.

Reply to Appellees' Point 1(a).

(The California Supreme Court's Determination of the Absence of Any Disputed Material Questions of Fact Was Made After Careful Investigation and Its Determination Is Conclusive.)

Appellee argues that this Court should not be called upon to review the correctness or incorrectness of the decision made by the California Supreme Court granting prohibition, because the California Supreme Court has said, "none of the persons attacking the contract has

pointed to any evidence which would present a substantial question of fact upon a material issue."

The answer to this argument is found in *Merchants v. Richmond*, 256 U. S. 635, 638 and *Postal v. Newport*, 247 U. S. 464, 473.

In the *Merchants* case *supra*, plaintiff in error drew in question the validity of an ordinance imposing a tax on the ground of its repugnance to a Federal statute. The State Supreme Court had sustained the ordinance. The United States Supreme Court held that a writ of error was the appropriate process for reviewing the final judgment of the State Supreme Court with respect to the contention made that certain evidence had not been passed upon, or findings of fact made thereon. The United States Supreme Court in reversing the judgment of the State Court said:

> "But this omission does not relieve us of the duty of examining the evidence for the purpose of determining what facts reasonably might be, and presumably would be, found therefrom by the State Court, if plaintiff in error's contention upon the question of Federal law should be sustained and the facts thereby shown to be material."

In *Postal v. Newport*, *supra*, in reversing a judgment in favor of a municipality in a suit to recover license taxes, the United States Supreme Court said:

> "But the question arises whether the basis of fact upon which the State Court rested its decision denying the asserted Federal rights *has any support in the record*; for if not it is our duty to review and correct the error." (Emphasis added.)

In *Carlson v. Washington*, 243 U. S. 103 the United States Supreme Court said:

> "While in ordinary cases, we are bound by the findings of the State Court of last resort respecting matters of fact, it is hardly necessary to say that that Court cannot, by omitting to pass upon the basic questions of fact, deprive a litigant of the benefit of a Federal right, any more than it could do so by making findings that were wholly without support in the evidence."

The California Supreme Court acting under a miscomprehension of the facts and law deprived appellant of due process of law in granting prohibition on the assumption that none of the persons attacking the contract had pointed to any evidence which would present "a substantial question of fact upon a material issue."

The court in violation of fundamental principles rejected appellant's contention that the following issues were material questions of fact in case 699077 and were equally in issue in the Referendum case:

(1) Whether the land was no longer required for the use of the city;

(2) Whether the Council had made any investigation to determine if the land was no longer required for the use of the city as required by the charter and rules of the council;

(3) Whether the Council had obtained the approval of the city department under whose control the land was held as provided by Section 393 of the Charter;

(4) Whether it was the intent of the parties to exempt the ball club from the payment of real property taxes for 20 years;

(5) Whether it was the intent of the parties in granting the ball club control over the expenditure of two million dollars of municipal funds to enable the ball club to pave its parking lot at public expense;

(The City Council has now, without waiting for this Court to act, awarded a contract to grade that portion of the land upon which the stadium will be built to be paid for with public funds for the personal benefit of the ball club in the sum of $646,890.00);

(6) Whether the City was proceeding to acquire with public funds land from private owners for the purpose of conveying the land to be acquired to the ball club and to do so without any additional consideration therefor;

(7) Whether the land to be acquired was being acquired for a public purpose;

(8) Whether it was necessary for the city to acquire the additional land;

(9) Whether the proffered evidence in case 699077 rejected by the trial court would be admissible in the referendum case;

The trial court's decision similarly shows that these questions of fact were considered by the trial judge:

1. That the City Council had the right to sell the land only if it *"properly determined"* that the land was no longer required for the use of the City (J. S. Appx. B, p. 22);

2. That the declaration in the ordinance ("whereas the land is no longer required for the use of the city") was not in accordance with the *facts recited* (J. S. Appx. B, pp. 24-25);

> ". . . the finding of the legislative body is not conclusive and that the court *may examine the facts*

to determine whether there has been an abuse of discretion or an illegal expenditure of public funds or that the action is ultra vires". (emphasis added) (J. S. Appx. B, p. 28);

3. Whether the land the City proposes to buy and immediately convey to the Ball Club *was being acquired for a public purpose* (J. S. Appx. B, pp. 29-34);

4. The factual interpretation to be given the words "proper condition" (J. S. Appx. B, pp. 36-37).

All of the foregoing issues are questions of fact and were in issue in the referendum case.

Concerning the recital in the ordinance that the City is in the process of acquiring additional property and such property is no longer required for the use of the City, the trial court declared:

Thus, although the trial judge inadvertently sustained an objection to the introduction of the rules of the Council, the trial court later in its decision recognized and declared that the Council could only sell the land if it "*properly determined*" that the land was no longer required for the use of the City.

The Charter, which is the Constitution of the City imposes a limitation upon the sale of municipal owned land, to-wit: "any real property owned by the City of Los Angeles *that is no longer required for the use of the City*, may subject to the limitations elsewhere prescribed in this charter be sold . . ." (Emphasis added.) (Sec. 393 Charter of Los Angeles.)

Even if it be assumed that this provision could be held applicable to land acquired in trust, appellant raised as an issue in the case, which he pursued at every stage of the

proceedings, that the declaration in the ordinance reciting that the land was no longer required for the use of the City was a false recital.

Appellant asked for a jury trial on this issue, and a pre-trial order was made (which in California has the force of a judgment), reciting:

> "Counsel for the plaintiff LOUIS KIRSHBAUM demands a trial by jury and states that the issues of fact to be tried by the jury are whether at the time of the adoption of the ordinance in question the declaration in the ordinance that the land is no longer required for use of the City is a false recital."

Trial by jury was later waived but this issue was submitted to the trial court who expressly found that the declaration in the ordinance was a false recital.

There was an additional question of fact which went to the jurisdiction of the Council to act, and of which the State Courts were required to take judicial notice.

The Charter of the City of Los Angeles provides for a committee form of government. (Sec. 34, Los Angeles Charter.) The Rules of the Council require all matters filed with the City Clerk to be referred to the appropriate committee. [Rules of the Council number 48, 50 and 52. Ex. Clk. Tr. case 155, Vol. III.] Upon objection of appellees the trial court refused to permit the rules to be received into evidence. [Rep. Tr. case 699077, pp. 207, 208, 209.]

In concluding that none of the persons attacking the contract had pointed to any evidence which would present a substantial question of fact upon a material issue the California Supreme Court overlooked that the minutes

of the Council introduced into evidence disclosed that the Council had failed to make any investigation to properly determine whether the land was required for the use of the City.

Section 48, 50 and 52 of the rules of the Council expressly provide for the procedure to be followed by the Council in matters presented to the Council:

"48. With the exception of matters required by law to be first presented to the Council, the President shall refer to the appropriate committees or departments all matters filed with the City Clerk or presented directly to the Council. A memo of such references shall be furnished to each Councilman.

"50. A committee (special or standing) appointed to report on any subject shall report the facts in relation to the matter or subject referred, with its findings thereon in writing; and no report shall be received as the report of a committee except the same shall be signed by a majority of the committee. Nothing herein contained shall prevent a minority from submitting its report at the time the majority report is submitted.

"52. All committees shall report to the Council their findings on matters referred to them. After two weeks from the time any matter is referred to a committee or committees such matter may upon motion be withdrawn from such committee or committees and presented to the Council for its consideration or action."

These rules when read together with Section 34 of the Charter, imposed on the Council a mandatory jurisdictional condition precedent before it could lawfully sell municipal owned land.

Whether these provisions of the charter and rules had been complied with was a *question of fact* upon which the jurisdiction of the Council to act depended and was an issue in the case.

The Court was required to take judicial notice of the Charter which in California has the force of a statute. It was similarly required to take judicial notice of the rules of the Council adopted pursuant to the Charter.

Code Civ. Proc., Sec. 1875;

Varcoe v. Lee, 180 Cal. 338 "An appellate court can properly take judicial notice of any matter of which the court of original jurisdiction may properly take notice. Pennington v. Gibson, 16 How. 65").

Rules created pursuant to the charter have the same force as the charter provisions.

Perez v. Board of Police Commissioners, 78 Cal. App. 2d 638;

Campbell v. City of Los Angeles, 47 Cal. App. 2d 310;

Montenegro v. Board of Education, 145 S. W. 740;

Hicks v. Long Beach, 55 Atl. 250;

Erie v. Mayor, 76 Atl. 1065 (N. J.);

Baker v. Combs, 239 S. W. 56 (Ky.).

An ordinance passed in violation of such rules is nugatory.

Swindell v. State, 42 N. E. 528 (Ind.).

What the law requires to be done for the protection of the taxpayers is mandatory.

Clark v. Crane, 5 Mich. 151.

The referral to a Committee of the Council to determine whether the land was no longer required for the use of the City was a condition precedent to the power of the Council to act. The Council was without power to act on the proposed contract until a *committee of the Council* had completed and submitted to the Council a Committee Report concerning its findings and recommendations as to whether they had found that the *land was no longer required for the use of the City.*

Section 34 of the Charter of the City of Los Angeles provides that all the functions of government shall be divided into divisions equal to the number of the members of the Council—that it *shall* be the duty of each such committee to be fully informed of the business of the City included within the division to which it is assigned, and to report to the City Council such information and recommendations.

The following cases hold that reference to a committee, when so required by Charter, is a condition precedent to the exercise of its power to act:

In *Schofield v. City of Los Angeles*, 120 Cal. App. 2d 240, it was held that the provisions of the Charter of Los Angeles, which provided that no zoning ordinance shall be adopted unless first submitted to the City Planning Commission for a report and recommendations, are not merely directory but constitute conditions precedent and that without compliance with them such an ordinance cannot be legally passed.

In *Worthington v. City of Covington*, 82 Ky. 265, the Charter provided that "before any contract shall be made by the Council . . . the proceedings of the Council with reference thereto shall be referred to the Committee on

Law." This was not done. Commenting on the failure to make this referral to the committee, the Appellate Court said:

> "The manifest object (of these provisions in the Charter) was to prevent improvident legislation by the Council; to create a circumspect body that would stand between the street contractor and the City Treasurer; between the lot owner and the tax collector; between the citizen and the almost absolute power of the City Council, and see that no wrong was committed. The Council not having taken the steps which gave it a right to contract or to create a lien upon the lots of the appellant for the cost of the improvement in question, which action was a *condition precedent* to the exercise of its power to do so or to make the assessment, the judgment below is reversed."

In *Gilman v. City of Milwaukee*, 61 Wisc. 588, the Charter provided that all resolutions of the Council creating any charge against the City shall be referred to appropriate committees and shall be acted on by the Council only at a subsequent meeting not held on the same day.

On appeal, the Superior Court of Wisconsin said:

> "This section is expressly prohibitory. In direct violation the matter embraced in the resolution was never referred to any Committee by the common Council and was acted upon by them not only on the same day on which it was first presented but also at the same meeting of the Council . . . . *Such requirements were preliminary to such action upon the merits and to our minds was jurisdictional.*

Being jurisdictional and such preliminary never having been had, the Council was without power to pass the resolution."

In this case, the evidence is uncontroverted that there was no reference to a committee and no report in writing to the Council concerning the issue as to *whether the land was no longer required for the use of the City.* It follows that the City Council had no power to approve the proposed contract until such a report had been submitted to them by the appropriate Committee concerning this issue.

In the case of *Cimpher v. Oakland*, 162 Cal. 87, the California Supreme Court said:

> "If it be conceded that the city had power to grant or sell the tidelands for what appears to have been a private use or to dispose of them at all except in aid of the public rights of navigation and fishery, it could do so only in the manner prescribed by its Charter."

The law in California repeated in case after case is as stated in the case of *Keller v. Oakland*, 54 Cal. App. 169, 172:

> *"When power is delegated to municipal bodies, and the mode for the exercise of that power is prescribed the mode must be followed. As has been repeatedly held the mode in such cases constitutes the measure of the power."* (Emphasis added.)

The *California* decisions have established and sustained the fundamental doctrine that Charters being the creatures of the Legislature and the instruments for exercising

powers delegated to municipalities the *mode therein prescribed must be followed exactly.*

Zottman v. San Francisco, 20 Cal. 96 (regarded as a leading case);

Macoy v. Bryant, 53 Cal. 247;

Osborne v. Stone, 170 Cal. 480 ("Where the mode is thus prescribed any radical departure from it results in a void contract");

Reams v. Cooley, 171 Cal. 150, 154.

The California Courts have consistently held that municipal contracts entered into without compliance with the Charter are void:

In re City and County of San Francisco, 195 Cal. 426, 434, 444;

Times Publishing Co. v. Weatherly, 139 Cal. 618;

Gamewell v. Los Angeles, 45 Cal. App. 149, 154.

Contrary to appellee's contention that the California Supreme Court's determination of the absence of any disputed material questions of fact should be held by this Court to be conclusive the undisputed evidence establishes that the determination and action of the Supreme Court has no support in the record, is contrary to the applicable law and has violated a federal right. Due process of law was violated in the denial of the right to be heard in the referendum case, the right to offer evidence and to a judgment on the merits.

The California Supreme Court acted under a clear mistake of law:

1. In disregarding that the undisputed evidence (the minutes) showed that the Council had violated the mandatory requirement of the charter and rules of the Council;

2. In making a determination that the declaration in the ordinance was conclusive on the courts;

3. In concluding that there were no material questions of fact;

4. In granting prohibition against a court of competent jurisdiction under the following circumstances:

(a) Without passing on the constitutional question as to whether a Superior Court may hear a case involving the validity of a referendum election;

(b) Without passing on the jurisdictional question as to whether a referendum election may take place involving the administrative act of selling municipal owned land; or of selling land held in trust.

(c) Without passing on the constitutional right of the appellant to introduce additional evidence in the Referendum case.

5. In depriving a court of its constitutional granted power to determine on the merits: questions of law and fact in a case within its jurisdiction.

6. Employing the writ of prohibition for the purpose of indirectly attacking a completed judgment in a separate case from which an appeal was being taken.

The error made by the California Supreme Court in determining that there was no substantial questions of fact raised upon a material issue is traceable to the court's conclusion that evidence proffered to show that the Council had taken no steps to determine whether the land was no longer required for the use of the City was inadmissible. The California Supreme Court concluded that the "proffered evidence if admitted would be insufficient to overcome the declaration in the ordinance that the land to be conveyed by the City was no longer

required by the City, since the offer does not show any fraud or abuse of discretion by the Council."

This interpretation made by the California Supreme Court that the evidence offered by appellant to show that the City Council had not complied with the mandate of its Charter was not sufficient to overcome the declaration in the ordinance that the land was no longer required for the use of the City, since the offer did not show that any fraud or abuse of discretion, misjudged the purpose of the offer of the proof and contrary to established law.

In *Phelps v. Witt*, 201 S. W. 2d 671, the Court there said:

> "One of the *tests* of whether or not an official, or a set of officials, has abused discretion lies in a determination of whether or not the pertinent law has been closely followed. See vol. 12, Words and Phrases, Perm. Ed. page 588. (If appellees did not submit their proposed plans, site, and community selection to the state superintendent for his approval, or, at least, for his advice, we do not see how it can be logically contended that they have closely followed the law or more specifically the regulations provided under the law and set up for the particular benefit of all of our public school systems of this commonwealth.)"

Due process of law is denied by an interpretation that the legislative finding of a city council is not subject to judicial inquiry.

United States v. Carolene, 304 U. S. 142, 150, 152, 153;

Chicago v. Minnesota, 134 U. S. 418, 456, 457;

Cincinnati v. Vester, 281 U. S. 439, 447.

In *Block v. Hirsh*, 256 U. S. 135, the United States Supreme Court said,

> "no doubt it is true that a legislative declaration of facts that are material only as the ground for enacting a rule of law for instance, that a certain use is a public one may *not* be held conclusive by the courts." (Emphasis added.)

The *California* Courts have similarly held that a declaration or resolution made by a Council or Board of Supervisors is not conclusive on the courts:

People v. Los Angeles, 62 Cal. App. 781;
San Christina v. San Francisco, 167 Cal. 762, 769, 770, 772;
Coulter v. Pool, 187 Cal. 181, 185, 186;
In re Newell, 188 Cal. 762;
Logan v. Shields, 190 Cal. 664.

Thus it follows as stated within the case of *Postal v. Newport*, 247 U. S. 464, "the question arises whether the basis of fact upon which the state court rested its decision denying the asserted federal rights has any support in the record, for if not it is our duty to review and correct the error."

Additionally since appellant's case is based upon an alleged impairment of contract it is for the United States Supreme Court to determine whether the deed is a valid contract, what was its proper construction and was its obligation impaired by subsequent legislation as enforced by the State Court.

"These questions" the court said in *Appleby v. New York*, 271 U. S. 364, 379, "we must answer independently

of the conclusion of the state court. * * *" It makes no difference that the answer to them involves general or purely local law, we cannot surrender the duty to execute our own judgment.

II.

Reply to Appellees' Point 2.

(The Determination That Public Funds May Lawfully Be Expended by the City of Los Angeles Involves Only the Construction of a City Ordinance and the Power and Authority of the City of Los Angeles Under the Constitution and Laws of the State of California.)

Appellee argues that appellant's question number 3 raises a question solely of construction of the ordinance and that this is not a matter to be reviewed in the United States Supreme Court.

Appellant's question number 3 is as to whether the City Council and the Mayor violated due process of law under the 14th Amendment of the United States Constitution in approving the ordinance for the expenditure of tax funds for the purpose of acquiring and conveying land to a private corporation, engaged in a private enterprise for its private profit.

Appellant will make no reply at this time to the cases cited by appellee for the reason that appellant has not endeavored to brief this point in his statement of jurisdiction. This point is being answered in the *Julius Ruben*, case, No. 291.

III.

Reply to Appellees' Point 3.

(Whether the City of Los Angeles May Sell to a Private Corporation Land Acquired From the Housing Authority of the City of Los Angeles (a State Agency) by Deed Containing Language Relative to Use for Public Purposes Only and Use Its Best Efforts to Have This Deed Restriction Removed Involve Matters Relating to Construction of the Deed and Power and Authority of the City Under State Law Which Are the Subject of Review by the United States Supreme Court nor Is Any Contract Right of Any Member of the Public Involved.)

Appellee argues that appellant's question No. 4, which is stated in the above heading, is a misinterpretation of the ordinance. Appellee declares that the ordinance merely provides that the City agrees to use its best efforts to have such deed restriction eliminated or modified so as to permit use contemplated by the Ball Club.

Appellee overlooks that Section 1 of said ordinance obligates the City to convey the land. Section 1 of said ordinance reads as follows:

> "1. City will convey the property presently owned by it in Chavez Ravine consisting of 185 acres, more or less, . . ."

Appellee then argues that both appellant's questions 4 and 6 involve merely an interpretation of the deed provision and the power of the City to act in the premises. Question 6 is as follows:

> "Did the City Council and the Mayor violate Article 1, section 10 of the U. S. Constitution in adopting an ordinance which approves the extinguishment of a

public purpose Deed Restriction thus constituting an impairment of contract as against the beneficiaries of the contract, to wit, the citizens of the municipality?"

In *Seattle v. Washington*, 23[illegible] U. S. 568, cited by appellees, the United States Supreme Court refused to interfere with the construction of an ordinance dealing with apportionment of street car fares after a transfer. No contention was raised in the case of impairment of contract and the Supreme Court specifically declared that *there was not involved in the case an impairment by later legislation.*

The case of *Fischer v. St. Louis*, 194 U. S. 361 cited by appellees is equally not in point. In that case the Supreme Court held that an ordinance which permitted the City to prohibit the erection of cow stables within prescribed limits did not deprive the defendant of his property without due process of law, nor deny to him the equal protection of the laws.

Appellee's contention that an interpretation of the deed and the power of the City to act are questions not reviewable in the United States Supreme Court are not supported by the two cases cited above and relied upon by appellee.

On the other hand, this Court has never deviated from the earlier decisions that a deed is a contract within the protection of Article I, Section 10 of the United States Constitution. The earliest case on this subject is *Fletcher v. Peck*, 10 U. S. 87.

In that case the Supreme Court denounced the action of the State of Georgia in adopting an abortive act which

sought to invalidate a sale of land previously made by the State to the grantor of the plaintiff. The Supreme Court said,

> "for a party to pronounce its own deed invalid, whatever cause may be assigned for its invalidity, must be considered as a mere act of power which must find its vindication in a train of reasoning not often heard in courts of justice."

In the present case there is a parallel, for here it is the Housing Authority who is seeking equally with the City to pronounce its own deed restriction invalid.

In the *Fletcher* case the Supreme Court went on to hold that a grant was an executed contract, and that the inhibition against impairment is applicable against the state.

In *Wood v. Lovell*, 313 U. S. 369, the Supreme Court similarly declared that land sold by the State

> "constituted the execution or consummation of a contract, the rights arising from which are protected from impairment by Article I, sec. 10 of the Constitution, and the obligation of the state arising out of such a grant is as much protected by Article I, sec. 10 as that of an agreement by an individual." (The court citing *Fletcher v. Peck.*)

In the great and celebrated case of *Dartmouth College v. Woodward*, 17 U. S. 654, the inhibition upon the states to impair by law the obligation of contracts, received the most elaborate discussion, and the most efficient and instructive application. The argument of the Supreme Court in this celebrated case contains one of the most full and elaborate expositions of the constitutional sanctity of

contracts to be met with in any of the reports. (1 Kent's Com. 415, 418.) See also a consideration of this case in 2 Story on the Constitution, Sections 1394, 1395.

In *Davis v. Gray*, 83 U. S. 232, an ordinance seeking to divest a railroad company of its title to land previously conveyed to it by the State, was declared by the United States Supreme Court to be a nullity. The court adding that it was too well settled that a land grant was a contract within the protection of the United States Constitution.

Appellee argues that any contract right protected by Section 10 of Article I, that may be involved is between the grantor housing authority and the City of Los Angeles as distinguished from the individuals forming the public. Reliance is made upon the case of *Walsh v. Columbus*, 176 U. S. 469.

In that case the *plaintiff did not seek relief as a taxpayer and on behalf of all other taxpayers.*

The right of a taxpayer to prevent the illegal expenditure, waste, or injury to the estate, funds, or property of a municipality is expressly granted by Statute in California Code of Civil Procedure, Section 526a.

This statute has been interpreted to authorize taxpayers suits to enjoin the diversion of municipal owned lands in violation of the trust upon which it is held.

Griffith v. Department of Public Works, 141 Cal. App. 2d 376;

O'Melveny v. Griffith, 178 Cal. 1;

Schaefer v. Berinstein, 140 Cal. App. 2d 278;

Marshal v. Standard, 17 Cal. App. 2d 19.

Appellee then argues that assuming for the sake of argument that there is involved a dedication for public

use, there is no violation of contract even as against the grantor in subsequently abandoning such public use.

This argument overlooks the principle that land acquired subject to a public purpose deed restriction is received in trust for public purposes.

Land acquired subject to a public purpose deed restriction cannot be sold. (*Futterer v. City of Sacramento*, 196 Cal. 248; *Hoadley v. San Francisco*, 50 Cal. 265; *Sawyer v. San Francisco*, 50 Cal. 370; *Hoadley v. San Francisco*, 70 Cal. 320, affirmed 124 U. S. 646.)

No California case has been cited by appellees which has upheld the power of a municipality to sell land acquired subject to a public purpose deed restriction.

The highest courts in other states have similarly held that a sale of land held subject to a public purpose restruction is prohibited. In *Warren v. Mayor*, 27 Iowa 351, and *Cook v. Burlington*, 30 Iowa 94, 98, the Supreme Court of Iowa held that such a sale would constitute an impairment of contract.

The effect of the conveyance from the Housing Authority was to vest legal title in the City of Los Angeles upon an express trust to use the land for public purposes. (*Hame v. City of Polson*, 215 P. 2d 950.) Such a conveyance created a trust with legal title in the City as trustee for the benefit of the public. (*City of New Orleans v. Louisiana*, 85 So. 2d 503.) The City had a right to accept such a trust. (*Ash v. City of Omaha*, 41 N. W. 2d 386, 396.)

There is no legal precedent in the state of California which will permit a municipality, chartered or otherwise, to extinguish a public purpose deed restriction imposed by the grantor, or to sell such land to a private corporation engaged for private profit.

Appellant does not question the power of the City of Los Angeles to dispose of, in accordance with the charter, land acquired unconditionally and to which it holds full title. Appellant does question the power of the city to either sell or extinguish a public purpose deed restriction imposed by the grantor for the benefit of all the taxpayers of the municipality. Such a conveyance is inalienable and would constitute an impairment of contract if authorized by legislative act.

No reply will be made at this time to appellees point 4 and point 5. If the court grants appellants request for the opportunity to present full briefs these points will then be coyered fully.

Reply to Appellees' Point II.

(The Federal Questions Sought to Be Reviewed Were Not Timely or Properly Raised or Expressly Passed on by the California Supreme Court.)

The issue of timeliness has been fully answered by appellant in the brief filed by appellant in reply to motion to dismiss of appellee Dodgers. Reference is hereby respectfully made to pages 17-19.

With respect to the contention that the Federal questions were not expressly passed upon, reference is made to the case of *Columbia v. South Carolina*, 261 U. S. 236.

In that case it was contended that the judgment of the state court was based upon its own construction of the contract and not at all upon the statute.

Answering this jurisdictional challenge the United States Supreme Court said,

> "But although the state court may have construed the contract and placed its decision distinctly upon

its own construction, if it appear, upon examination, that in real substance and effect, force has been given to the statute complained of our jurisdiction attaches.

"In Houston & T. C. R. Co. vs. Texas, 177 U. S. 66, 77, 44 L. ed. 673, 680, 20 Sup. Ct. Rep. 545, this court said:

'Thus we see that, although the decision of the state court was based upon the ground that the warrants in which these payments were made had been issued in utter violation of the state Constitution, and were hence void, and that no payments made with such warrants had any validity, and although this ground of invalidity was arrived at without any reference made to the Act of 1870, yet the necessary consequence of the judgment was that effect was thereby given to that act, and in a manner which the company has always claimed to be illegal and unwarranted by the act when properly construed. The company has never accepted such a construction, but, on the contrary, has always opposed it, and raises the question in this proceeding at the very outset. Upon these facts this court has jurisdiction, and it is its duty to determine for itself the existence, construction, and validity of the alleged contract, and also to determine whether, as construed by this court, it has been impaired by any subsequent state legislation to which effect has been given by the court below.'"

The California Supreme Court expressly passed upon the validity of the ordinance and upheld the right of the City to extinguish the deed restriction. In answer to appellants contention that the sale or extinguishment of the

deed restriction would constitute an impairment of contract the court said,

> "It is contended that the city does not have power to sell to a private corporation land held by the city subject to a public purpose restriction imposed by the grantor's deed to the city and that the city has no power to enter into an agreement with a private corporation obligating the city to extinguish such a restriction."

The Supreme Court then proceeded to justify the extinguishment of the deed restriction on the *untenable* grounds that the deed restriction was not a valid deed restriction, and the restriction actually contemplates the possibility of a sale.*

Thus although the California Supreme Court did not mention the federal constitution such failure to do so may not deprive this court of its jurisdiction and of its duty to determine for itself the existence, construction and validity of the alleged contract, and also to determine whether as construed by this Court it has been impaired by the ordinance to which effect has been given by the California Court.

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*As discussed in detail in appellant's Jurisdictional Statement, pages 20 and 21, the Court's contention that the deed restriction contemplates a sale of the property to a private party is completely *untenable*. It requires the interpretation that the vital words "to be used for public purposes only," the basic restriction in the deed, are *superfluous*. The logical and obvious interpretation is that (1) the words "to be used for a public purpose" mean precisely what they say, and (2) that the restriction against housing was added to prevent the City or any *public* agency that might become a *successor* or *grantee* of the City using the property for public housing which would not be in conflict with the basic and primary restriction "to be used for public purpose only."

Reply to Appellees' Point III.

(The Judgment Rests on an Adequate Non-Federal Basis.)

The contention made by appellee that the judgment rests on an adequate non-federal basis is actually a repetition of appellees earlier point that the federal question was not passed upon by the California Supreme Court.

The jurisdiction of this Court to review a judgment of a state court, the effect of which is to deny a federal right, cannot be avoided by placing such judgment on non-federal grounds which are plainly untenable. (*Ward v. Board of County Commissioners,* 253 U. S. 17.)

It is respectfully submitted that the motion of the appellee City of Los Angeles is without merit and should be denied.

Respectfully submitted,

PHILL SILVER,

Attorney for Appellant.